IN THE HIGH COURT OF JUDICATURE AT BOMBAY@@
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ORDINARY ORIGINAL CIVIL JURISDICTION@@
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COMPANY PETITION NO. 69 OF 2003@@
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In the matter of M/s Zenith@@
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Metaplast Pvt.Ltd@@
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M/s Madan Sales Corporation .. Petitioner

Mr.Subhash Jha and Mr.Devraj Agarwal and
Mr.Navin Chomal for Petitioner
Mr.S.Kulkarni for Company.

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CORAM : S.U.KAMDAR, J@@
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DATE: 9TH DECEMBER, 2004.@@
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1. The present Company Petition is filed under section 434 of the Companies Act, I of 1956. The claim in the present petition is for a sum of Rs.7,77,969/-.

Some of the material facts briefly enumerated are as under :

2. The petitioner firm is inter alia carrying on business in supplying elctro plating chemicals. Prior to 1998, the petitioner was supplying these material to firm known as " M/s Sargam Industries." However, there were difference and disputes by and between the petitioner and the said M/s Sargam Industries. In view thereof, the petitioner herein stopped the supply of the material to the said firm. It is an admitted position that the said Sargam Industries was carrying on what is known as 'job work' of electro plating for and on behalf of the respondent company namely M/s Zenith Metaplast Pvt.Ltd. In 1998, it was decided that a new arrangement will be arrived at under which the petitioner will be supplying material of electro plating chemicals to the said Sargam Industries but invoices in respect thereof will be raised directly

to the respondent company and that the respondent company shall make the payment directly to the petitioner. Thus, a privity of contract was established by and between the petitioner and the respondent company herein directly. It seems that from August, 2000 the company did not make payment of the various outstanding amounts covered under various invoices which were duly delivered to the respondent company. However, there has been certain disputes by and between the respondent company and the said firm known as Sargam Industries. It is the case of the petitioner that sometime in or about March, 2001 there has been part payment by the respondent company and the respondent company has been assuring that further payments will be made. On 12th September, 2001 the respondent company made further payment of a sum of Rs.65,000/- with promise to clear the dues thereof.

3. On 22nd November, 2001 the respondent company issued a notice to the petitioner threatening to file proceedings against the petitioner for recovery of certain amounts on the purported ground that there has been an excess payment. It is the case of the respondent company that on 20th April, 2001 there has been a reconciliation of accounts between the respondent company and the said Sargam Industries and while carrying out reconciliation of accounts, it was noticed that in fact there has been an excess payment effected by the respondent company and thus the petitioner is not entitled to any amount whatsoever but in fact the respondent is entitled to refund of excess payment made. On 26th November, 2001 a statutory notice was issued by the petitioner for recoveries of their claim under section 433 of the Companies Act I of 1956. There has been a reply filed by the respondent company inter alia disputing the said claim.

4. The essence of the dispute is that there has been excess payment as determined by reconciliation by the respondent company with the firm of Sargam Industries. After issuance of the statutory notice on 20th December, 2001 the respondent company has filed a suit being Special Civil Suit No.15 of 2002 before the Civil Judge, Senior Division, Nasik. To the said suit, the respondent company has impleaded M/s Sargam Industries and the petitioner herein as party defendant to the said suit. In the said suit, the respondent company had prayed for recovery of a sum of Rs.16,75,918.44 as also it has been claimed therein that claims made by the petitioner should be declared as false and further declaration that no amount is due and payable by the respondent company. The said suit is pending

before the Nasik Court.

5. The petitioner has in the present petition relied upon a Balance Sheet of the respondent company as on 31st March, 2002. In the said Balance Sheet, the claim of the petitioner is expressedly admitted in as much as said statement of account including the list of respondents indicates the name of the creditor and the amount outstanding against the name of the petitioner as Rs. 7,79,969/-. Thus, according to the petitioner as on 31st March, 2002 there has been an admission of liability on the part of the respondent company for making payment of the aforesaid amounts. In view of non payment of the amount though admitted, the petitioner has filed this petition for winding up on the ground that the respondent company is unable to pay its debts and thus requested that the company be wound up.

6. On the other hand, learned counsel for the respondent company has contended before me that the present petition is not a bonafide petition and there are serious disputes and therefore the Company Petition should be dismissed. It has also been contended by learned counsel for the petitioner that the company is in a position to make the payment of the debt and is in a sound financial condition and therefore, no orders should be passed in the present Company Petition.

7. Learned counsel for the respondent company has contended before me that the difference and disputes between the petitioner and the respondent has arisen right in 2001 and it is the respondent company who issued a first notice on 22nd November, 2001 threatening to file a suit against the petitioner for recovery of excess payments made. The said notice was received by the petitioner on 23rd November, 2001. However, there was no reply to the said notice. It is only thereafter that the petitioner company has issued a statutory notice on 26th November, 2001. It is therefore contended by the learned counsel for the respondents that there are bonafide disputes between the parties and therefore the present petition should be dismissed. In support of the aforesaid arguments, he also relied upon the suit which has been preferred by the respondent company and which is pending in Nasik Court being Special Civil Suit No 15 of 2002 of 2001. In my view the aforesaid contentions are not bonafide and therefore does not raise any bonafide disputes in the present proceedings. It is the case of the respondent company itself that they have ascertained the excess payments on the

basis of the reconciliation carried out by them with one Sargam Industries and not with the petitioner herein. Apart therefrom, it is not the case of the respondent company that they have made excess payment to the petitioner. However, argument of the learned counsel for the respondent is that bill for supplying of chemicals is much higher than the the bill of the labour charges and therefore there is an excess amount claimed by the petitioner and thus same requires to be rectified. According to the respondent company, on such rectification, there will be an excess payment made to the petitioner. In my view, once bills are issued by the petitioner company pursuant to the arrangements arrived by and between the petitioner and the respondent and that the bills are accepted, without raising any dispute in that behalf, it is not open for the respondent company to dispute the said amount subsequently by relying upon reconciliation of books of accounts of the respondent company and a third party namely Sargam Industries. According to me, it is also equally impermissible for the respondent company to raise any dispute about the excess charges levied by the petitioner in respect of the supply of the electro plating material merely by relying upon the amount claimed as labour charges by Sargam Industries. In my view, the aforesaid contentions are not bonafide. There is no bonafide dispute. On the other hand, as late as on 31st March, 2002 the respondent company has admitted the liability in their balance sheet by specifically specifying the name of the petitioner indicating the amount of liability as the amount of Rs.7,79,969/-. Secondly, no disputes were raised to the supplies that were effected and bills were raised. Reply of the learned counsel for the respondent company that they were in bonafide belief that bills were raised as per the agreed amount, cannot be accepted atleast at this stage as bonafide defence. In that view of the matter, according to me, there are no bonafide disputes raised by the respondent company. Argument of the learned counsel for the respondent company that there is a previous suit filed by the respondents before the present company petition is filed also cannot be equally accepted. Merely by filing of a suit or merely raising of the disputes cannot ipso facto mean that the petition must be dismissed under section 434 of the Companies Act, 1956. If disputes are raised earlier to the claim raised by the petitioner company, the said dispute has to be a bonafide dispute and must be such that the court must come to the conclusion that the dispute being bonafide requires trial and the summary jurisdiction of the court under section 434

of the Companies Act need not be exercised. In the light of the view I have taken, that the disputes raised by the respondents is not bonafide, I am not inclined to accept the argument merely because a suit was filed in earlier point of time. This takes me to the second contention which has been raised by the learned counsel for the respondent company. Learned counsel for the respondent company contended that the company is financially sound and that itself is sufficient ground for dismissal of the present company petition. He has contended that even if there are no bonafide disputes raised by the respondents but, because the company is in financially sound condition, no order of winding up can be given in exercise of the jurisdiction under section 434 (1) of the Companies Act. I am unable to accept this argument for more than one reason. Firstly because, if there are no bonafide disputes raised to the claim filed under section 434 (1) it creates a deeming fiction that the company is unable to pay its debts. Thus, mere contention that the company is in a sound condition cannot displace such a deeming provision provided for under the provisions of section 434 of the Companies Act, I of 1956. Secondly, if such a contention is accepted then every company who is in a sound condition would refuse to comply with its obligation to pay the debt by merely contending that though the said debt is payable but they are not willing to pay the same and still winding up orders should not be passed because, they are in financially sound condition. In my view, such a submission is devoid of merits and cannot be accepted. It is now settled law that under the provisions of section 433 and 434 of the Companies Act, 1956 a company has to establish a bonafide defence to the claim of the petitioner and on failure to do so the court must exercise its jurisdiction under section 433 and 434 of the Companies Act. In the aforesaid light of the fact, I pass the following order :

> " I direct the respondents to give a bank guarantee of a nationalised bank in a sum of Rs.7,00,000/-on or before 15th February, 2005. The said Bank Guarantee will be initially for a period 3 years and shall be renewed the same from to time. If such a bank guarantee is not furnished, then the Company Petition do stand admitted and made returnable on 10th March, 2005. In the event if the Bank Guarantee is furnished then the petition to stand dismissed and the petitioner will be at liberty to file a suit within a period of two weeks from the

date of intimation that such a Bank Guarantee is furnished by the respondent company by the Advocate of the respondents company to the petitioner and/or his advocates. The said Bank Guarantee will be credited to the credit of such a suit. In the event if the petition is admitted, the same to be advertised in two newspapers namely " Navshakti" and Free Press Journal and in Maharashtra Goverment Gazette. The petitioner is also directed to deposit a sum of Rs.2000/- with the Prothonotary and Senior Master, High Court, Bombay towards the cost of advertisement. If the petitioner fails to advertise as directed, the Prothonotary and Senior Master to advertise the petition as provided hereunder.

8. Petition disposed of as above. There shall be no order as to costs.

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